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No. 99-598

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1999

PACIFIC LUMBER COMPANY, a Delaware corporation; SCOTIA PACIFIC COMPANY, LLC, a Delaware corporation; and SALMON CREEK CORPORATION, a Delaware corporation,

Petitioners,

v.

MARBLED MURRELET *(Brachyramphus marmoratus)*; NORTHERN SPOTTED OWL *(Strix occidentallis caurina)*; and ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the neutrally-worded fee-shifting provision of the federal Endangered Species Act ("ESA"), 16 U.S.C. section 1540(g)(4), providing for a discretionary award of reasonable attorney and expert witness fees to "any party, whenever the court determines such award is appropriate" is to be governed by the dual standard favoring civil rights plaintiffs of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), or by the evenhanded rule found applicable to neutrally-worded fee-shifting statutes in *Fogerty v. Fantasy Records, Inc.*, 510 U.S. 517 (1994).

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REPLY TO BRIEF IN OPPOSITION

Respondents argue that the "dual standard" for the award of attorneys' fees established in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), must be engrafted on the fee-shifting provision of the ESA. Respondents' arguments, and their misstatements of the existing case law and legislative history, reveal a degree of uncertainty and confusion on this important issue that demonstrates the criteria of Rule 10 are met. However, the Petition discussed these points, and this Reply will not reiterate that discussion. Instead, this Reply will address Respondents' jurisdictional arguments and certain of the other creative arguments made in their lengthy opposition brief.

A. FEDERAL COURT JURISDICTION TO AWARD ATTORNEYS' FEES CONTINUES TO EXIST

Respondents argue that jurisdiction to award attorneys' fees no longer exists because (1) the district court, following the Ninth Circuit decisions in favor of PALCO, granted the motions of PALCO and the federal defendants for summary judgment, and then also granted the federal defendants' motion to dismiss Respondents' section 7 claims for lack of subject matter jurisdiction, and (2) the ESA itself does not authorize an award of fees based on section 7 claims. Opp. Br. at 6-9. Respondents made both arguments before the Ninth Circuit, which did not even acknowledge them in its opinion. Respondents' jurisdictional arguments are as meritless now as they were then. They should not distract this Court from the important question presented by this Petition.

After the Ninth Circuit decisions in favor of PALCO on Respondents' section 7 claims, PALCO and the federal defendants filed motions for summary judgment. The district court, finding "no genuine dispute as to any material fact and Defendants are entitled to judgment as a matter of law on all claims," granted the summary judgment motions and entered judgment in favor of PALCO and the federal defendants. App. D at 41a. The district court also granted a motion made by the federal defendants under Federal Rule of Civil Procedure 12(b)(1) on the ground that subject matter jurisdiction was lacking over Respondents' section 7 claims because "no reasonable jury could find that the Service engaged in 'agency action'." *Id.* Subsequent to the entry of judgment in its favor, PALCO timely filed a motion for attorneys' fees. The district court evaluated PALCO's request for attorneys' fees on the basis that the court has "entered summary judgment in favor of [PALCO] on the [s]ection 7 claim." App. C at 16a. The Ninth Circuit, in turn, considered PALCO's appeal of the district court's Order denying its request for attorneys' fees on the basis that "the district court granted summary judgment to [PALCO] on the [section] 7 claims." App. B at 5a.

Even if the district court had entered judgment in favor of PALCO based on lack of subject matter jurisdiction, it would have retained jurisdiction to decide issues collateral to the merits, such as requests for attorneys' fees. *See Willy v. Coastal Corp.*, 503 U.S.

131, 137-138 (1992). Neither the district court nor the Ninth Circuit would have been divested of jurisdiction to decide such collateral issues. The rule proposed by Respondents would preclude fee awards pursuant to fee-shifting statutes to defendants who win on motions to dismiss, because such statutes generally require a showing that the party seeking fees has prevailed in the case, and a defendant cannot be said to have prevailed until the case against him has been dismissed. This is not the law. It is standard procedure for district courts to consider motions for attorneys' fees after they enter judgment. *See* Fed. R. Civ. Proc. § 54(d)(2)(B) ("Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment.").

The very decision creating a circuit split on the question whether the "dual standard" governs the award of attorneys' fees pursuant to the neutrally-worded fee-shifting provisions of environmental statutes, *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir. 1987), is instructive. There, like here, the district court entered summary judgment in favor of the defendant based on a circuit court decision on a question of first impression rendered after the suit was filed. *See id.* at 1171. In fact, in *Shell Oil Co.*, the intervening decision of the Fifth Circuit was that court's holding, before this Court so ruled in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), that the Clean Water Act did not authorize citizen suits based on past violations. *See Shell Oil Co.*, 817 F.2d at 1174-1175. After entering summary judgment in favor of Shell because Sierra Club failed to establish ongoing violations, the district court awarded Shell attorneys' fees under the fee-shifting provision of the Clean Water Act (even though the need for an intervening appeals court decision obviously signaled Sierra Club's suit was not frivolous), and the Fifth Circuit affirmed. *See id.* at 1176.

In the merits appeals in this case—*Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996) *("Marbled Murrelet I")*, *Marbled Murrelet v. Babbitt*, 111 F.3d 1447 (9th Cir. 1997) *("Marbled Murrelet II")*, Apps. E and G—the Ninth Circuit held that it, and the district court before it, had jurisdiction to decide whether or not Respondents had stated a valid cause of action. After having aggressively litigated these cases against PALCO before the district court and Ninth Circuit for more than four years, it is strange indeed

for Respondents to now argue that those courts were wrong to have entertained their section 7 claims in the first place. Respondents' section 7 claims were not so obviously invalid as to deprive the courts below of subject matter jurisdiction to consider the merits of those claims. *See Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1010 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction."). PALCO never argued Respondents' section 7 claims were frivolous. Indeed, the whole point of this Petition is to seek this Court's clarification that such a showing is not required for PALCO to be awarded attorneys' fees.

Respondents' further jurisdictional argument is even more obviously erroneous. They argue that because *Bennett v. Spear*, 520 U.S. 154 (1997), held that "section 1540(g)(1)(A)'s reference to any single 'violation' of the ESA cannot be interpreted to include the Secretary's maladministration of the [ESA]," and section 1540(g)(4) allows attorneys' fees only for suits "brought pursuant to" section 1540(g)(1), there is no statutory basis in the ESA for PALCO's claim for attorneys' fees for its successful defense of the ESA section 7 claims. Respondents ignore the fact that they sued PALCO, not just the Secretary. Section 1540(g)(1)(A) allows suit against "any person . . . alleged to be in violation of this chapter." PALCO was alleged to be in violation because it was harvesting timber with the approval of the U.S. Fish and Wildlife Service, but without the required "consultation" having been conducted by the Service prior to giving its approval.

Moreover, in support of this point Respondents rely on an inapposite appeals court case that cited *Bennett* in holding that statutory authority was lacking under the ESA to award attorneys' fees based on successful prosecution of an ESA section 7 claim against the federal government. *See Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998). In that case, the lower court lacked "jurisdiction" to issue orders enforcing a judgment because plaintiff withdrew its motion and no "case or controversy" existed as a basis for judicial action; attorneys' fees for earlier litigation efforts were not available under the ESA's fee-shifting provision, because the suit was against government officials for "maladministration of the ESA," which this court said in *Bennett* could not be maintained under

section 1540(g)(1)(A), and the other subsections of section 1540(g)(1) also did not authorize the action. The issue presented by this case—attorneys' fees for suit involving a private party's alleged violation of the ESA—was not presented.

B. THE "DUAL STANDARD" WILL DISCOURAGE MERITORIOUS DEFENSES THAT FURTHER THE PURPOSES OF THE ESA

That the 1980s and 1990s have witnessed a flood of citizen suits brought under federal environmental statutes is denied by no one. The financial burden of these suits is not meaningfully mitigated by the fact that many of them, like the underlying suit in this case, have been filed against the federal government. In many such cases, as in this case, there is a real party in interest who must assume the laboring oar in defending federal agencies' actions. Indeed, in this case, the federal government was not a party in the appeals of the underlying merits judgments, leaving it to PALCO, without assistance from the federal Department of Justice, to expend great cost and effort in reaching a result that the Ninth Circuit itself found furthered the purposes of the ESA. It will be the rare defendant that will make such an effort if the Ninth Circuit's imposition of the "dual standard" on the ESA's fee-shifting provision is allowed to stand.

It bears repeating what the Ninth Circuit observed would have befallen administration of the ESA if PALCO had not persevered:

> Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform burdensome procedural tasks mandated by section 7 simply because it had advised or consulted with a private party. Such a rule would be a distinct disincentive for the agency to give such advice or consultation. Moreover, private parties who wanted advice on how to comply with the ESA would be loath to contact the FWS for fear of triggering burdensome bureaucratic procedures. As a result, desirable communication between private entities and federal agencies on how to comply with the ESA would be stifled and protection of threatened and endangered species would suffer.

Marbled Murrelet I, App. G at 83a. A defense that results in a ruling that furthers the purposes of the ESA is a "public good" that Congress nowhere indicated private party defendants should automatically bear the costs of producing. And, as this case shows, a successful defense of a suit may further the policies of the ESA every bit as much as a successful prosecution of an ESA citizen suit.

C. THE "DUAL STANDARD" WILL UNDERMINE ADMINISTRATION OF ENVIRONMENTAL LAWS BY THE FEDERAL AND STATE GOVERNMENTS

In addition to discouraging vigorous defense and appeal of important cases involving interpretation and administration of the ESA, imposition of the "dual standard" on the ESA's fee-shifting provision will create a completely risk-free environment for ESA citizen suits. Because courts will apply the "dual standard" to the similarly worded fee-shifting provisions of other environmental statutes, the Ninth Circuit's ruling can be expected to generate an overwhelming volume of citizen suits that will wholly undermine the federal executive's primary responsibility for enforcing the environmental laws. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989). Furthermore, such a proliferation of citizen suits will greatly compromise the "cooperative federalism" ordained by Congress in a number of environmental laws, such as the Clean Water Act and the Resource Conservation and Recovery Act, providing for delegation of authority to states to run environmental programs. Congress intended citizen suits to "supplement rather than supplant governmental action." *Gwaltney*, 484 U.S. at 60. To ensure that citizen suits are limited to the supplementary role envisioned for them by Congress, it is important that the boundaries of private citizen suit enforcement authority "be demarcated as clearly as possible." *Fogerty v. Fantasy Records, Inc.*, 510 U.S. 517, 527 (1994). A determination by this Court whether the "dual standard" is appropriate for citizen suits brought under federal environmental statutes would do just this.

D. Recourse To The Legislative History Of The ESA Is Inappropriate, And Unenlightening In Any Event

Respondents' recourse to legislative history is inappropriate. The fee-shifting portion of the ESA's citizen suit provision, 16 U.S.C. section 1540(g)(4), could not be any plainer. It authorizes district courts to award fees "to any party, whenever the court determines such award is appropriate." *Id.* The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. [Judicial] inquiry must cease if the statutory language is not ambiguous and 'the statutory scheme is coherent and consistent'." *Robinson v. Shell Oil Co.*, 136 L. Ed. 2d 808, 813 (1997) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)). Here, the statutory language is unambiguous and giving effect to its plain meaning is wholly consistent with the ESA's statutory scheme. Like the Copyright Act at issue in *Fogerty*, "the policies served by the [ESA] are more complex, more measured, than simply maximizing the number of meritorious suits." *Fogerty*, 510 U.S. at 526. As this Court has observed, in addition to species conservation, "economic consequences are an explicit concern of the [ESA]." *Bennett*, 520 U.S. at 177. Congress' evident decision that private defendants not automatically have to shoulder the expense of producing a "public good"—an interpretation of the ESA that clarifies its administration—is consistent with Congress' concern with the economic consequences of the Act.

Moreover, "[t]he best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98 (1991). Where the statutory text contains a word or phrase that is unambiguous, as here, this Court "do[es] not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process," *id.*, as Respondents seek to do.

Even if it were appropriate to look to legislative history in this case, that proffered by Respondents, and relied upon by the Ninth Circuit below, is a Rube Goldberg. It consists of a House Committee

Report on the ESA, which, in turn, references the Marine Protection, Research and Sanctuaries Act ("MPRSA"), and a Senate Committee Report on the MPRSA. Neither report is a conference committee report—generally regarded as the most authoritative of legislative history materials. *See National Ass'n of Greeting Card Publishers v. USPS*, 462 U.S. 810, 832 n.28 (1983) (conference committee report "would be due great weight"). The Conference Committee Report on the ESA does not even reference, let alone endorse, the House Committee Report's statement regarding interpretation of the ESA's fee-shifting provision. *See* H.R. Conf. Rep. No. 740, 93rd Cong., 1st Sess. (1973). So, too, the Conference Committee Report on the MPRSA fails to reference, let alone endorse, the Senate Committee Report's statement regarding interpretation of that statute's fee-shifting provision. *See* H.R. Conf. Rep. No. 1546, 92nd Cong., 2nd Sess. (1972). Furthermore, the House Committee Report on the ESA does not even reference the Senate Committee Report on the MPRSA, but only the MPRSA itself. Finally, Congress could easily have provided for the "dual standard" to be applied to requests for attorneys' fees under the ESA, as it did in numerous contemporaneous statutes (*see* Petition at 18 n.19; Brief of Amici Curiae American Forest & Paper Association, *et al.* at 12-13.); it chose instead to enact language that favors neither plaintiffs nor defendants.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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